

TRANSCRIPT OF PROCEEDINGS  
IN  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902

No. 340.

EDWIN F. HALE, APPELLANT.

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN CHARGE,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 22, 1902.

(19,342.)

(19,842.)

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Writ of *Habeas Corpus*.

The President of the United States to William Henkel, Esquire,  
United States marshal for the southern district of New York,  
Greeting:

We command you, that you have the body of Edwin F. Hale, by  
you imprisoned and detained, as it is said, together with the time  
and cause of such imprisonment and  
(Seal of U. S. Circuit Court, detention, by whatsoever name he  
Southern District, New shall be called or charged, before the  
York.) circuit court of the United States in  
and for the southern district of New  
York, in the second circuit, on the 24th day of May, 1905, at 10.30  
o'clock in the forenoon of that day, to do and receive what shall then  
and there be considered concerning the said Edwin F. Hale; and  
have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the  
Supreme Court of the United States, the 13th day of May, one thou-  
sand nine hundred and five.

JOHN A. SHIELDS,  
Clerk of the Circuit Court of the United States  
for the Southern District of New York.

The foregoing writ is hereby allowed. The petitioner may be ad-  
mitted to bail in the sum of \$1,000, pending the proceedings thereon.

WM. J. WALLACE,  
United States Circuit Judge.

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## Petition.

To the circuit court of the United States in and for the southern dis-  
trict of New York, in the second judicial circuit:

The petition of Edwin F. Hale respectfully shows:

I. That your petitioner is a citizen of the United States, an inhab-  
itant and citizen of the State of New York, and a resident of the city  
of New York, in this circuit and district.

II. That your petitioner is now, and for upwards of a year has  
been, continuously, a director, and the secretary and treasurer of the  
McAndrews and Forbes Company, a corporation duly organized and  
existing under and by virtue of the laws of the State of New Jersey.

III. That your petitioner is now actually imprisoned and re-  
strained of his liberty and detained by color of the authority of the  
United States, in the custody of William Henkel, Esquire, United  
States marshal in and for the southern district of New York, to wit,  
at the borough of Manhattan, of the city of New York, in the said  
district.



IV. That the sole claim or authority by virtue of which the said William Henkel, marshal as aforesaid, so restrains and detains your petitioner, is a certain commitment in writing, a copy of which is hereto annexed marked "A."

V. That the said commitment was issued pursuant to an order of this court made and entered at a stated term thereof held at the post office building in the city of New York on the 8th day of May, 1905, a copy of which said order is hereto annexed marked "B."

3 VI. That the said last mentioned order was made and based solely and exclusively, upon two certain presentments or reports presented to and filed in this court by the grand jury of the United States for the southern district of New York, on the 5th and 8th days of May, 1905, respectively, copies of which said presentments or reports (which are referred to and described in the said last mentioned order as "charges of contempt") are hereto annexed, marked "C" and "D," respectively.

VII. That your petitioner's imprisonment, restraint and detention are without authority of law whatsoever, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

(a.) This court was without jurisdiction under the said Constitution and laws, by reason of any of the matters or things contained and set forth in the said presentments or reports of the grand jury, or either of them, to entertain any charge or charges of contempt against your petitioner, or to act or proceed in any manner in the premises.

(b.) At the time your petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was no "cause" or "action" of any kind whatever depending in this court between the United States and the corporations named in the *subpoena duces tecum*, a copy of which is annexed to Exhibit "C," in which your petitioner could be required under the said Constitution and laws, to testify or give evidence before the grand jury.

(c.) The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set  
4 out in the said reports or presentments, the powers of a Federal grand jury being limited under the Constitution to the investigation of specific charges against particular persons, and there being under investigation by the grand jury at the time your petitioner attended before them no specific charges against any particular person; consequently its requirement that your petitioner should testify and produce documentary evidence, and the orders of the court based thereon, were *coram non judice* and void.

(d.) Section 1 of the legislative, executive and judicial appropriation act for the fiscal year ending June 30, 1904, approved February 25, 1903, being chapter 755 of the United Statutes of 1903 (32 Stat., 904), providing, among other things, that no person shall be prosecuted, or be subjected to any penalty or forfeiture, for or on account of any

transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under the acts therein mentioned, does not give your petitioner immunity from prosecution, for or on account of transactions, matters or things concerning which he was directed to testify and produce evidence before the grand jury, the investigation herein before that body upon which he was required to testify and produce said papers and documents not being a proceeding, suit or prosecution under either of the acts referred to in the act of February 25, 1903; consequently your petitioner was privileged under the Constitution and laws of the United States, and particularly by the 5th amendment to the said Constitution, to refuse to testify or produce evidence before the grand jury upon the said investigation, when

by so doing he might criminate himself, as he avers, he might  
5 have, had he given the testimony or produced the papers and documents as required by the grand jury and the court.

(e.) The said act of February 25, 1903, is unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things constituting violations of the laws of the United States, on condition that they will, when so required, testify and produce evidence, documentary or otherwise, concerning such violations in proceedings, suits or prosecutions under the three statutes mentioned therein, thus usurping and infringing upon the pardoning power exclusively vested in the President by the express terms of section 2, of article II of the Constitution of the United States, and which is not subject to legislative control; consequently the said act does not operate to deprive your petitioner of his right under the constitutional provision above mentioned to refuse to criminate himself.

(f.) The said act of February 25, 1903, is also unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, provided such persons testify or produce evidence, documentary or otherwise, concerning such transactions, matters and things, in proceedings, suits or prosecutions under the three acts before mentioned, thus infringing upon and setting at naught the express provisions of article X of the amendments to the Constitution of the United States that the powers not delegated to the United

States by the Constitution, nor prohibited by it to the States,  
6 of which the right to prosecute and punish offenders against their own peace and dignity is one, are reserved to the States, respectively, or to the people.

(g.) The said act of February 25, 1903, is further unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things, notwithstanding such transactions, matters or things may constitute violations of the laws of the various States, provided such persons testify and produce evidence, documentary or otherwise, concerning

such transactions, matters or things in proceedings, suits or prosecutions under the statutes therein mentioned, thus usurping the power expressly reserved to the States by article X of the amendments to the Constitution of the United States to grant or withhold pardons, and to provide for and deal with the granting or withholding thereof, in accordance with their own constitutions and laws.

(h.) The act of February 25, 1903, contains no requirement that a person shall testify or produce evidence in proceedings, suits or prosecutions under the three acts notwithstanding such testimony or production may tend to criminate him; therefore its only effect is to render testimony incompetent as evidence when the person giving it has voluntarily waived his constitutional privilege, whereas before the passage of the act such testimony could have been used against the person giving it.

(i.) The court's order of May 5th, directing your petitioner forthwith to produce the papers called for by the *subpoena duces tecum* was made in violation of your petitioner's rights under the fourth amendment to the Constitution of the United States providing that  
 7 the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.

(j.) The said order of May 5th was, in effect, a warrant to search for and seize the papers mentioned in the said *subpoena duces tecum*, and not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe the place to be searched or the things to be seized, its issuance constituted a violation of the said fourth amendment.

(k.) The papers mentioned in the said *subpoena duces tecum* being the property of the McAndrews and Forbes Company and in your petitioner's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produce such papers thereunder would, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation, in violation of its rights under the said fourth amendment, which it was in your petitioner's duty as such officer and custodian to protect by lawful means, as he is now doing.

(l.) The production of the said papers being required of your petitioner in his capacity of officer and director of the said corporation, and the order of May 5th so requiring, not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe the place to be searched, or the things to be seized, its issuance constituted a violation of the said fourth amendment; consequently, not only was your petitioner under no legal  
 8 obligation to enforce or obey the same, but his duty as such officer and director required him to disobey it.

VIII. Your petitioner is advised by counsel and verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order to the custody of the marshal were without legal right, authority or jurisdiction of

any kind, and are utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder.

Wherefore your petitioner prays that a writ of *habeas corpus* may issue directed to the said William Henkel, Esquire, marshal as aforesaid, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

Dated at the city of New York the 11th day of May, 1905.

NICOLI, ANABLE & LINDSAY,  
Attorneys for the Petitioner.

Office and post-office address, 31 Nassau street, Manhattan, New York, N. Y.

9 UNITED STATES OF AMERICA, }  
Southern District of New York, } ss.:

Edwin F. Hale being duly sworn deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWIN F. HALE.

Sworn to before me this 11th day of May, 1905.

[SEAL.] E. MORTIMER BOYLE,  
Notary Public, New York County.

10 "A."

Circuit Court of the United States, Southern District of New York.

In the Matter of EDWIN F. HALE, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness Edwin F. Hale, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court,

upon the fifth day of May, 1905, and the said witness, on that day, appearing in person, in open court, and having been ordered by the court to answer said questions and produce said papers and documents; and further charges of contempt having been presented by the said grand jury, on the eighth day of May, 1905, showing that, after the making of the said order of May fifth, 1905, the said witness appeared before the said grand jury and again refused to answer the said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, filed herein on the fifth day of May, 1905, and the eighth day of May, 1905, respectively; and the said

11 Edwin F. Hale having again appeared in person, in open court, on the said eighth day of May, 1905, and been heard, and an order having, thereupon, been made, in writing, by this court, on the eighth day of May, 1905, wherein it was considered, ordered and adjudged by this court that the said Edwin F. Hale be adjudged to have committed the contempt alleged, and that he be fined the sum of five dollars (\$5.00), and that he be committed to the custody of the marshal until he complies with the aforesaid order of the court, by answering the said questions and producing said papers and documents, or be discharged by due process of law;

This, therefore, is to command the United States marshal, for the southern district of New York, to take and receive the said Edwin F. Hale into his custody, in pursuance of the aforesaid order, and to detain him until he be legally discharged.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eleventh day of May, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

JOHN A. SHIELDS,

Clerk of the Circuit Court of the United States of  
America for the Southern District of  
New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,  
United States Circuit Court.

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"B."

At a stated term of the circuit court of the United States, held at the post office building, in the city of New York, on the 8th day of May, 1905.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of EDWIN F. HALE, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness Edwin F. Hale, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court, upon the fifth day of May, 1905, and the said witness, on that day, appearing in person in open court, and having been ordered by the court to answer said questions and produce said papers and documents; and further charges of contempt having been presented by the said grand jury, on the eighth day of May, 1905, showing that,

13 after the making of said order of May fifth, 1905, the said witness appeared before the said grand jury and again refused to answer said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, filed herein on the fifth day of May, 1905, and the eighth day of May, 1905, respectively; and the said Edwin F. Hale having again appeared in person, in open court, on the said eighth day of May, 1905, and been heard, it is now

Considered, ordered and adjudged by the court that the said Edwin F. Hale be, and he is hereby, adjudged to have committed the contempt alleged; that he be, and he hereby is, fined the sum of five dollars (\$5.00); and that he be committed to the custody of the marshal, until he complies with the aforesaid order of the court, by answering said questions and producing said papers and documents, or is discharged by due process of law.

May 8, 1905.

E. HENRY LACOMBE, U. S. C. J.

A copy.

[SEAL.] JOHN A. SHIELDS, Clerk.

"C."

NEW YORK CITY, N. Y., May 5th, 1905.

To the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York.

14 SIR: The grand jury for the March term, 1905, respectfully represents to your honor, and charges, that Edward F. Hale is guilty of contempt of court, in this, to wit: That upon the

28th day of April, 1905, a subpoena, in due form, was served upon the said Edward F. Hale, commanding him to appear before the said grand jury, at a certain time named in the said subpoena, to wit: on the second day of May, 1905 (a copy of which subpoena is annexed to the transcript of the minutes of the said grand jury which transcript is hereunto annexed and made a part hereof), to testify and give evidence in a certain matter then under investigation before the said grand jury, and to produce, at the said time and place, various books, letters, memoranda and other writings, all of which are specifically enumerated and set forth in the said subpoena hereto annexed, to which reference is hereby made, and which is hereby made a part hereof.

That the said Edward F. Hale appeared before the said grand jury, on the said second day of May, 1905, in obedience to the said subpoena, but failed and refused, and still fails and refuses, to produce before the said grand jury the aforesaid books, letters, memoranda and other writings, or any of them.

That the said books, letters, memoranda and other writings, are material to an investigation being conducted before the said grand jury.

That the said Edward F. Hale, on the said second day of May, 1905, further failed and refused, and still fails and refuses, to answer certain questions pertinent to the said investigation and material thereto, which questions were propounded to the said Edward F. Hale, before the said grand jury, by Mr. Henry W. Taft, an assistant to the United States attorney for the southern district of New York, who was then in attendance before the said grand jury and was conducting the said investigation in behalf of the said grand jury, which said questions are as follows:

(1.) Having been asked the question, "What is your business?" and having answered, "I am secretary and treasurer of MacAndrews & Forbes Company," he was asked the following question: "That company is engaged in what business?" which question the said Edward F. Hale then and there refused to answer; and the witness was thereupon asked the following further questions, and did then and there fail and refuse to answer the same, to wit:

(2.) "What business were you in before you came to New York city?"

(3.) "Who is president of the MacAndrews & Forbes Company?"

(4.) "What is the business of the MacAndrews & Forbes Company?"

(5.) "Where is their office?"

(6.) "And where is the office of the American Tobacco Company?"

(7.) "Who is president of the American Tobacco Company?"

(8.) "Is there any agreement, or understanding, or arrangement, between the American Tobacco Company and MacAndrews & Forbes Company, in relation to the trade or business in licorice,



licorice paste or licorice mass, affecting the business between several States of the United States?"

(9.) "Do you know a company by the name of J. S. Young Co.?"

16 (10.) "Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?"

(11.) "Are you in the employment of the American Tobacco Company?"

That a copy of the minutes of the proceeding before the grand jury, at which the said Edward F. Hale attended as aforesaid, and at which he failed and refused to produce the said books, letters, memoranda and other writings, and at which he failed and refused to answer the aforesaid questions, is hereto annexed, the same being a true and correct transcript of the minutes of the said proceeding, and of the whole thereof, marked "Schedule A," and made a part hereof.

That the witness was duly advised, at the time and place aforesaid, that the proceeding then pending before the said grand jury was a proceeding under the so-called Sherman act, being "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Statutes, 209, First Supplement U. S. Revised Statutes, 726, *et seq.*, and the acts amendatory thereof and supplementary thereto, and, particularly, chapter 755 of the Laws of 1903, approved February 25th, 1903; and he was then and there further advised that, under the last named act, no person shall be prosecuted, or subjected to any penalty or forfeiture, for, or on account of, any transaction, matter or thing concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said act—that is to say, under the Sherman act—under which the aforesaid proceeding was brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment

17 for perjury committed in so testifying; and the said Edward F. Hale was then and there further advised by Mr. Henry W. Taft, an assistant to the United States attorney for the southern district of New York as aforesaid, as follows:

"I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you are now asked to testify to, or produce evidence, documentary or otherwise, regarding it in this proceeding, and that I offer you, and assure you, immunity and exemption for any such testimony that you may give."

And the said Edward F. Hale was, thereupon, asked the following question by Mr. Henry W. Taft, assistant to the United States attorney for the southern district of New York, as aforesaid, to wit: "Do you decline to answer the questions which have been put to you?" to which question the said Edward F. Hale then and there answered, "I must respectfully decline to answer;" and, thereupon, the said Mr. Henry W. Taft, assistant to the United States attorney for the



southern district of New York, as aforesaid, asked the said Edward F. Hale the following question: "You decline to answer all of the questions which have been put to you, on the ground that you have stated, in relation to each of the questions?" to which question the said Edward F. Hale then and there answered: "I do."

That each of the said questions was pertinent to the said investigation and proceeding then pending before the said grand jury and was material thereto.

Wherefore, the said grand jury charges that the said Edward F. Hale is in contempt of court, and asks that such proceedings may be had as are, in the premises, in accordance with law.

THOS. W. FOLSOM, Foreman.  
NELSON F. GRIFFIN, Secretary.

#### SCHEDULE A.

Before the United States Grand Jury.

THE UNITED STATES	}
vs.	
AMERICAN TOBACCO COMPANY and McANDREWS & FORBES COMPANY.	

NEW YORK, May 2, 1905.

#### Appearances.

Henry W. Taft, Esq., assistant United States attorney.  
Felix H. Levy, Esq., assistant United States attorney.  
William S. Ball, Esq., assistant United States attorney.

EDWARD F. HALE, being duly sworn, testified as follows:

19 The witness presented a typewritten statement containing his reasons for not giving evidence in this proceeding.

Examined by Mr. TAFT:

Q. What is your name?

A. Edward F. Hale.

Q. Mr. Hale, where do you reside?

A. New York city.

Q. How long have you resided here?

A. I have lived here three years.

Q. Where did you reside before that?

A. In Louisville, Kentucky.

Q. What is your business?

A. I am secretary and treasurer of MacAndrews & Forbes Company.

Q. That company is engaged in what business?

A. I shall have to respectfully decline to answer further questions, on the grounds, first, that there is no legal warrant or authority for my examination as a witness, and, second, that my answers may tend to criminate me.

Q. What business were you in before you came to New York city?

A. I shall have to decline to answer further questions on the same grounds.

Q. Who is the president of the MacAndrews & Forbes Company?

A. I shall only have to repeat what I said before.

Q. You decline?

A. I decline to give further testimony on the grounds mentioned.

Q. What is the business of the MacAndrews & Forbes Company?

A. I shall give the same answer to that.

Q. Where is their office?

A. I shall repeat the answer as given before.

Q. And where is the office of the American Tobacco Company?

A. The same answer to that question.

Q. Who is the president of the American Tobacco Company?

A. I give the same answer to that question.

20 Q. Is there any agreement or understanding or arrangement between the American Tobacco Company and MacAndrews & Forbes Company in relation to the trade or business in licorice, licorice paste, or licorice mass, affecting the business between several States of the United States?

A. I must decline to answer, for the reason stated.

Q. Please state them again.

A. First, that there is no legal warrant or authority for my examination as a witness, and, second, that my answers may tend to criminate me.

Q. You appear here by virtue of a subpoena served upon you, do you not?

A. I do.

Q. Have you the subpoena here?

A. I have not.

Q. Have you produced the papers which are called for in that subpoena?

A. I have not produced the papers and documents, first, because it would have been a physical impossibility for me to have gotten them together within the time allowed, and, second, because I am advised by counsel that upon the facts as they now appear I am under no legal obligation to produce anything called for by the subpoena, and, third, because they may tend to criminate me.

Q. These papers which you have been asked to produce are the ones mentioned on the paper which I now show you?

A. This seems to be a copy of the summons that was served upon me.

Paper referred to by witness marked Exhibit A of this date.

Mr. TAFT: We will produce the return to the subpoena, showing the record of the papers asked for.

Q. Have you brought any of the papers called for by that subpoena?

A. I have not.

21 Q. Any of the documents, books, papers, memoranda, correspondence called for by that subpoena?

A. I have not.

Q. Do you know a company by the name of J. S. Young Company?

A. I must decline to answer the question; for the reasons given before.

Q. Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?

A. I must decline to answer the question for the reasons stated.

Q. Are you in the employment of the American Tobacco Company?

A. I must decline to answer, for the same reasons.

Q. Is your subpoena in this building?

A. I don't know.

Q. Do you wish to produce it?

A. I must decline to answer, for the reasons stated.

Q. Did you deliver the subpoena to your counsel?

A. Yes.

Q. Your counsel are in the building, are they not?

A. I suppose so.

Q. Will you get the subpoena from your counsel and bring it into the grand jury room?

A. Is it not in order for your marshal to get it?

Q. I am asking for the subpoena that was served upon you, that is the copy of the subpoena which was served upon you. Will you procure that from your counsel and produce it here for the grand jury?

A. I will do so.

Q. Will you kindly do so now?

A. I shall try, now.

Witness leaves the room and returns with copy of subpoena, which he delivers to Mr. Taft.

Copy of subpoena marked Exhibit B of this date.

22 Q. You discover, do you not, that the documents which are mentioned on the list which I handed you a moment ago correspond to those which appear upon this copy of the subpoena which you have now produced?

A. I think it is a carbon copy, is it not?

Q. If you will answer the question, "I do not know," I will ask the stenographer to incorporate in the record the documents as stated in the question, and I will again ask you if you have produced any of the arrangements, correspondence, memoranda, formal agreements, or writings, letters or telegrams, reports or accounts, or

any of the letters or copies of letters or other papers enumerated in the *subpoena duces tecum*?

A. I confirm my answer to similar questions, previously given.

Q. You say that you have not produced any?

A. I have not.

Q. For the reasons which you have previously stated?

A. For the reasons previously stated.

Q. Mr. Hale, I desire to advise you that this is a proceeding under the so-called Sherman act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762 and following, and the acts amendatory thereof and supplementary thereto, and particularly chapter 755 of the Laws of 1903, approved February 25, 1903, and I also advise you that under the last-named act, no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under the said act. That is, referring to the Sherman act, under which this prosecution is brought; provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

23 And I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture on account of anything that you are now asked to testify to or produce evidence documentary or otherwise regarding it, in this proceeding, and I offer you and assure to you immunity and exemption for any such testimony that you may give. Do you still decline to answer the questions which have been put to you?

A. I must respectfully decline to answer.

Q. You decline to answer all the questions that have been put to you on the grounds which you have stated, in relation to each of the questions?

A. I do.

Recess declared, until 2 p. m., same day.

After recess, hearing is adjourned to Friday, May 5th, 1905, at two o'clock, p m.

#### EXHIBIT B, MAY 2/05.

The President of the United States of America to E. E. Hale, 111 Fifth avenue, N. Y. city, Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America, for the southern district of New York, at a circuit court, to be held in the U. S. court and New York post office building, in the borough of Manhattan, city of New York, in and for the said southern district of New York, on the 2nd day of May, 1905, at 11 o'clock in the fore-

noon, to testify and give evidence in a certain action now pending undetermined in the circuit court of the United States for the southern district of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States and that you bring with you and produce at the time and place aforesaid,

(1.) All understandings, agreements, arrangements or contracts whether evidenced by correspondence, memoranda, formal agreements or other writings, between MacAndrews & Forbes Company and either of the following persons, firms, or companies, from the date of the organization of the said MacAndrews & Forbes Company :

J. S. Young Company,  
J. D. Lewis,  
American Licorice Company,  
National Licorice Company,  
Meller & Rittenhouse,  
Stamford Manufacturing Company.

(2.) All correspondence, by letter or telegram (including copies of all letters or telegrams sent by said MacAndrews & Forbes Company, or any of its officers, employees, agents or other representatives) between MacAndrews & Forbes Company and the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company :

J. S. Young Company,  
J. D. Lewis,  
American Licorice Company,  
National Licorice Company,  
Meller & Rittenhouse,

Stamford Manufacturing Company.

25 (3.) All reports made, or accounts rendered, to MacAndrews & Forbes Company, by the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company :

J. S. Young Company,  
J. D. Lewis,  
American Licorice Company,  
National Licorice Company,  
Meller & Rittenhouse,  
Stamford Manufacturing Company.

(4.) Any agreement or agreements, contract or contracts, arrangement or arrangements (whether evidenced by correspondence, telegrams, memoranda or formal written instrument) between MacAndrews & Forbes Company and the Amsterdam Supply Company, or the American Tobacco Company, or the Continental Tobacco Company or Consolidated Tobacco Company, from the date of the organization of the said MacAndrews & Forbes Company.

(5.) Any and all letters received by the MacAndrews & Forbes

Company, since the date of its organization, from any of the following named persons, firm- or companies :

- Strater Brothers, Louisville, Kentucky.  
 Monarch tobacco works, Louisville, Kentucky.  
 H. N. Martin Tobacco Company, Louisville, Kentucky.  
 Day and Night Tobacco Company, Cincinnati, Ohio.  
 E. O. Eshelby & Company, Cincinnati, Ohio.  
 Frischmuth Brothers & Company, Philadelphia, Pa.  
 Daniel Scotten Tobacco Company, Detroit, Michigan.  
 R. A. Patterson & Company, Richmond, Virginia.  
 26 Larus & Brother Company, Richmond, Virginia.  
 United States Tobacco Company, Richmond, Virginia.  
 P. Lorillard Company, Jersey City, New Jersey.  
 R. J. Reynolds & Company, Winston, North Carolina.  
 P. H. Mayo Company, Richmond, Virginia ;

and, also, copies of all letters and telegrams sent by the McAndrews & Forbes Company, since the date of its organization, to either of the said persons, firms or companies; and all contracts, agreements or arrangements between the said McAndrews & Forbes Company and any of the said persons, firms or companies, whether such agreements, contracts or arrangements are evidenced by correspondence, telegrams, memoranda or written instruments now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, the 28th day of April, 1905.

(S'g'd)

JOHN A. SHIELDS, Clerk.

27

"D."

UNITED STATES OF AMERICA,  
 Southern District of New York, City and }  
 County of New York.

MAY 8TH, 1905.

To the Honorable E. Henry Lacombe, judge of the United States circuit court for the southern district of New York :

The grand jury for the March term, 1905, respectfully represents to your honor, and charges, that Edwin F. Hale is guilty of contempt of court, in this: that,

Whereas, on the twenty-eighth day of April, 1905, a subpoena, in due form, was duly served upon the said Edwin F. Hale, commanding him to appear before the said grand jury, at a certain time named in the said subpoena, to wit, on the second day of May, 1905,

to testify and give evidence in a certain matter then under investigation before the said grand jury, and to produce, at the said time and place, various books, letters, memoranda and other writings, all of which were specifically enumerated and set forth in the said subpoena; and,

Whereas, the said Edwin F. Hale did appear before the said grand jury, on the said second day of May, 1905, in obedience to the said subpoena; but did fail and refuse to produce, before the said grand jury, the aforesaid books, letters, memoranda and other writings; and the said books, letters, memoranda and other writings, were then, and now are, material to an investigation being conducted before the said grand jury; and,

Whereas, the said Edwin F. Hale, did, on the said second day of May, 1905, further fail and refuse to answer certain questions  
28 pertinent to the said investigation, and material thereto propounded to him by the said grand jury; and,

Whereas, the said grand jury did, on the fifth day of May, 1905, duly present the foregoing facts to this honorable court, by a presentment in writing, duly signed by the said grand jury, by and through Thomas W. Folsom, Esq., its foreman, and Nelson F. Groffin, Esq., its secretary, which presentment in writing was duly filed in the office of the clerk of this court on said fifth day of May, 1905, and to which presentment, for greater particularity, reference is hereby made, and the same is hereby made a part hereof, in the same manner as if the same were here repeated at length; and,

Whereas, your honor did, on the said fifth day of May, 1905, duly consider the said presentment, and the said Edwin F. Hale being then present, in open court, your honor did, then and there, make the following order, to wit:

"The witness is hereby directed to answer the questions as propounded by the grand jury, and forthwith to produce the papers. Having made that presentment, he may now withdraw with the grand jury and see what the result is."

That thereupon, and in obedience to the said order, the said grand jury did thereupon withdraw to the grand jury room, together with the said Edwin F. Hale, and thereupon the said Edwin F. Hale was again asked the questions which were set forth in the said presentment, and which the said Edwin F. Hale had failed and refused to answer as aforesaid; and the said Edwin F. Hale was further then and there asked to produce the books, letters, memoranda and other writings called for by the *subpoena duces tecum* served upon him as aforesaid, and which books, letters, memoranda and other writings

the said Edwin F. Hale had failed and refused to produce  
29 before the said grand jury, as set forth in the said presentment, duly filed herein on the fifth day of May, 1905, as aforesaid; that the said Edwin F. Hale did, then and there, again fail and refuse to answer the said questions, and did, then and there, fail and refuse to produce the said books, letters, memoranda and other writings, which said questions the said Edwin F. Hale had



been directed by the court herein, as aforesaid, to answer, and which said books, letters, memoranda and other writings, the said Edwin F. Hale had been directed by the court herein, as aforesaid, to produce.

That a copy of the minutes of the proceeding before the grand jury, held on the said fifth day of May, 1905, as aforesaid, and at which the said Edwin F. Hale did again fail and refuse to answer the questions which he was directed by the court herein to answer as aforesaid, and at which he failed and refused to produce the books, letters, memoranda and other writings which he was directed by the court herein to produce, is hereunto annexed, the same being a true and correct transcript of the minutes of the said proceeding, and of the whole thereof, and marked "Schedule One," and made a part hereof.

That the said books, letters, memoranda and other writings, were then, and now are, material to an investigation being conducted before the said grand jury, and that the said questions propounded to the said Edwin F. Hale, as aforesaid, were and are pertinent to the said investigation and material thereto.

Wherefore, the said grand jury charges that the said Edwin F. Hale is in contempt of court, and asks that such proceedings may be had as, in the premises, are in accordance with law.

THOS. W. FOLSOM, Foreman.

NELSON F. GRIFFIN, Secretary.

30

## SCHEDULE ONE.

UNITED STATES  
vs.  
AMERICAN TOBACCO Co. and Ans. }

NEW YORK, May 5, 1905.

Met pursuant to adjournment.

Present: The grand jury, Mr. Taft, Mr. Levy, Mr. Ball.

The grand jury and the counsel repair to the rooms of the United States circuit court, and appear before Hon. E. Henry La Combe, circuit judge.

In this hearing before Judge Lacombe, De Lancey Nicoll, Esq., counsel for the defendants also appeared.

The COURT: Is the grand jury here?

The clerk calls the roll of the grand jury.

The CLERK: Have you any bills to present to the court?

The FOREMAN: Yes (hands paper up to the court).

The COURT: There is a clause here that reads: "And thereupon the said Henry W. Taft, assistant," etc., "asked the following questions," and you declined to answer all the questions which had been put to you, on the grounds which you have stated.



Mr. TAFT: It appears in the minutes and the papers which are attached as exhibits or schedules in the case. The witness himself stated from a typewritten paper, the grounds upon which he based his declination to answer.

The COURT: Was it the same ground?

Mr. TAFT: He repeated the grounds by reference back—except in the case of the documents he was asked to produce, and in relation to those he re-stated these grounds, and further stated the ground that they were too voluminous for him to produce within the time limited, and at the same time stated that there was no warrant for the proceedings, and that the production of the papers would tend to incriminate, or criminate him. I ask that the court adopt this procedure, for which I understand he has a precedent in a case which went to the United States Supreme Court, of *Brown vs. Walker*, under the interstate commerce law. In that case the court directed the witness forthwith to answer the questions and also forthwith to produce the papers described in the subpoena, and then the grand jury re-assembled and the witness was again asked the questions, declined to answer, and then the record was in shape for presentation to the court; with the direction that he show cause why he should not be committed for contempt. I ask that that procedure be followed in this case, as the term of this grand jury is about to expire, and that the question which has been raised may be argued deliberately by the counsel who have presented these objections.

I may say, the witness is now in court, having accompanied the grand jurors to the court room, and is here ready for the direction of the court.

Mr. NICOLL: Mr. Parker, Mr. Lindsay and myself represent the witness, and that form of procedure seems satisfactory to us.

The COURT: There is no other way. Has the matter been put in such shape?

Mr. TAFT: Then I will ask that the court direct the witness forthwith to answer all of the questions here stated in the return of the grand jury, or the presentment of the grand jury, and also that he forthwith—

The COURT: All the things enumerated in the subpoena?

Mr. TAFT: Enumerated in the subpoena; yes. And if it pleases the court, the grand jury will then retire. That presentment is here, and now made—

Mr. NICOLL: One moment. We have never seen the record.

Mr. TAFT: You will see it in time.

The COURT: The witness is hereby directed to answer the questions as propounded by the grand jury, and forthwith to produce the papers. Having made that presentment, he may now withdraw with the grand jury, and see what the result is. I suppose you wish me to wait for the return.

Mr. TAFT: No; if your honor please, it will be necessary to make

33 up the written return upon this next examination, and we will re-assemble the grand jury on Monday, in order that that return may be properly certified by the foreman, and it will then be presented.

Mr. NICOLL: Why not stipulate now that he has been directed, and that they have assembled.

The COURT: In criminal proceedings, stipulations don't answer the purpose. A defendant could not stipulate away his rights.

The grand jurors, the counsel for the Government, and the witness, Edwin F. Hale, then returned to the grand jury room.

EDWIN F. HALE—Examination resumed:

By Mr. TAFT:

Q. You have been directed by Judge Lacombe of the circuit court, to answer the questions which were propounded you by me on May 2nd. Do you so understand?

A. I do.

Q. You have also been directed by the court to produce the papers, documents, correspondence, memoranda, formal agreements, understandings in writing, other writings, reports, accounts, and all other papers here enumerated in the *subpoena duces tecum* heretofore served upon you and which subpoena you produced at the session of this grand jury held on May 2nd, 1905. Do you so understand?

A. I do.

Q. I now repeat the questions which were asked you at the last session. What is your name?

A. Edwin F. Hale.

34 Q. It was stated before to be Edward?

A. Probably misunderstood. Edwin is correct.

Q. Mr. Hale, where do you reside?

A. In New York city.

Q. How long have you resided there?

A. About three years.

Q. Where did you reside before that?

A. In Louisville, Kentucky.

Q. What is your business?

A. I am secretary and treasurer of the McAndrews & Forbes Company.

Q. What business is that company engaged in?

A. For the reasons mentioned in the statement filed by me with this grand jury on May 2nd, I must again respectfully decline to answer further questions.

Q. What business were you in before you came to New York city?

A. I must repeat the same answer, as given to the last question.

Q. You decline to answer?

A. I decline to answer.

Q. Who is the president of the McAndrews & Forbes Company?

A. I still decline to answer, for the reason stated.

Q. What is the business of McAndrews & Forbes Company?

A. The same response.

Q. Where is their office?

A. The same response to that question also.

Q. That is that you decline to answer?

A. I decline to answer, for the reasons stated.

Q. Where is the office of the American Tobacco Company?

A. I give the same response to that question.

Q. Who is the president of the American Tobacco Company?

A. The same response to that question also.

Q. You decline to answer?

A. Yes, sir.

35 Q. Is there any agreement or understanding or arrangement between the American Tobacco Company and MacAndrews & Forbes Company, in relation to the trade or business in licorice, licorice paste or licorice mass, affecting that business between several States of the United States?

A. For the reasons given before, I decline to answer.

Q. That is, I understand your reasons to be that there is no legal warranty or authority for your examination as a witness, and second that your answers may tend to criminate you?

A. Yes; as is fully set forth in the statement submitted on May 2nd.

Q. When you say the reasons set forth in the statement, to which statement do you refer?

A. I can repeat those.

Q. Have you got that statement?

A. I think I have (handing paper to counsel).

Q. These are the reasons contained in this statement?

A. Yes, sir.

Q. To wit?

A. (Reading :) "Before being sworn, I respectfully ask to be advised of the nature and purpose of the investigation in which I have been summoned here, whether it is under any statute of the United States, and the specific charge, if any has been made, in order that I may learn whether or not the grand jury has any lawful right or authority to make the inquiry, and whether there is anything lawfully pending here upon which witnesses may be summoned, sworn and examined; and I also ask that I be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which you are acting, in order that I may know concerning what transactions, matters or things I am called upon to testify or produce evidence. My subpoena requires me to attend and testify and give evidence in a certain action now pending and

36 undetermined in the circuit court of the United States for the southern district of New York between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States, and to produce various papers and documents. I am informed that there is no

action now pending in the circuit court between the Government and the corporations named, and the vague and general description of the papers and documents leads me to suppose that the grand jury is investigating no specific charge against any one. If that is the fact, my counsel advise me that I ought not to obey the summons or submit to examination." And my reasons as stated on May 2nd, were first, that there is no legal warrant for my examination, as a witness, and second, that my answers may tend to criminate me.

Q. You appear here by virtue of a subpoena served upon you, do you not?

A. I do.

Q. And you appeared at the last hearing by virtue of a *subpoena duces tecum* served upon you?

A. That is correct.

Q. Have you produced the papers, those that were called for by that subpoena?

A. I have not.

Q. And did you not produce them at the last hearing?

A. I did not.

Q. Do you decline to produce them?

A. I do, for the reasons stated heretofore.

Q. For the reasons stated at the last session of the grand jury?

A. That is correct.

Q. They are the papers which are mentioned in the subpoena which was served upon you?

A. Those are the ones that I declined to produce.

Q. Have you brought any of the papers mentioned in that subpoena?

A. I have not.

Q. Do you know a company by the name of J. S. Young Company?

A. I must decline to answer that question for the reasons stated.

37 Q. Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?

A. I must decline to answer that question for the same reasons.

Q. Are you in the employment of the American Tobacco Company?

A. I must decline to answer that also, for the same reasons.

Q. You identified those papers by reference to paper handed you at the last hearing, did you not?

A. As the ones asked for?

Q. Yes.

A. I did.

Q. That is, as being those asked for by Exhibit B, attached to the record (showing witness Exhibit B)?

A. That seems to be a copy of it.

Q. Mr. Hale, I advise you that this is a proceeding under the so-called Sherman act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and chapter 755 of the Laws of 1903, approved February 25, 1903, and I also advise you that under the last named act no person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under the said act. That is referring to the Sherman act, under which this prosecution is brought. Provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose not to proceed to prosecute you or subject you to

38 any penalty or forfeiture on account of anything that you are now asked to testify to, or produce evidence documentary or otherwise regarding it, in this proceeding, and that I offer you and assure you immunity and exemption for any such testimony that you may give. Do you still decline to answer the questions which have been put to you as above?

A. I must respectfully decline.

Q. And for the same reasons that you have stated?

A. For the reasons stated.

Q. You decline to answer each of those questions upon the grounds stated in relation to such questions?

A. I do.

Q. Do you also decline still to produce the documents, papers, memoranda, correspondence, reports, accounts, etc., mentioned in the *subpoena duces tecum*, Exhibit B, in this proceeding?

A. I must respectfully decline.

Q. And for the ground you have stated in relation to the same questions heretofore?

A. I do.

Q. Mr. Hale, will you be accessible at such time as the grand jury may wish your attendance?

A. I think so.

Q. Within the next week or so?

A. Oh, yes.

Q. Then we may wish your attendance on Monday?

A. If I am notified I will attend. I just wish to state that I have declined to answer the questions, with the utmost respect for this grand jury and for the judgment of the court.

Hearing adjourned to Monday, May 8th, 1905, at 10.30 a. m.

(Endorsed :) U. S. circuit court southern district New York. Filed May 13-1905.—John A. Shields, clerk.



41 (Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Writ of *habeas corpus* and petition.—Nicoll, Anable & Lindsay, attorneys for the petitioner, 31 Nassau street, New York.—To William Henkel, United States marshal, southern district of New York.—Defendant discharged on bail to appear May 24, 1905, at 10:30 o'clock a. m., May 15, 1905, John A. Shields, U. S. commissioner.—The defendant's bail continued. Dated May 24, 1905, E. H. Lacombe, U. S. C. J.—U. S. circuit court, southern district of New York, Filed May 24, 1905, John A. Shields, clerk.

42 U. S. Circuit Court, Southern District of New York.

In the Matter of the Application of EDWIN F. HALE for a Writ of *Habeas Corpus*. Bail Bond.

UNITED STATES OF AMERICA, }  
Southern District of New York, } ss :

Be it remembered, that on the 15th day of May, 1905, before me, John A. Shields, United States commissioner for the southern district of New York, personally came Edwin F. Hale, as principal, and the United States Fidelity & Guaranty Co., as surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Edwin F. Hale, the sum of one thousand dollars, and the said The United States Fidelity & Guaranty Co. the sum of one thousand dollars, separately, to be levied and made on their respective goods, chattels, lands and tenements, if default shall be made in the condition following, to wit :

Whereas, the said Edwin F. Hale was detained in the custody of William Henkel as United States marshal for the southern district of New York under an order of commitment of this court dated May 11th, 1905 ; and

Whereas, the said Edwin F. Hale on the 12th day of May, 1905, made an application to the United States circuit court before  
43 Honorable William J. Wallace for a writ of *habeas corpus* directed to said United States marshal, to inquire into the cause of said petitioner's detention ; and

Whereas, on the 13th day of May, 1905, this court granted said writ and made an order admitting said petitioner to bail pending the proceedings thereon ;

Now, therefore, the condition of this obligation is such that if the said Edwin F. Hale shall duly and personally appear in the United States circuit court for the southern district of New York on the 24th day of May, 1905, and from time to time hereafter, as said court may direct, and obey and abide the orders of said court, and not de-



part without leave, upon the conditions aforesaid, then this recognizance to be void, otherwise to remain in full force and virtue.

E. F. HALE, Principal.  
THE UNITED STATES FIDELITY AND  
GUARANTY COMPANY,  
By ALONZO G. OAKLEY, Att'y in Fact,  
Surety.

Attest:

GILMAN ASHBURNER,  
Att'y in Fact.

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,  
U. S. Commissioner.

44 Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK, }  
County of New York, } ss:

Before me personally came Alonzo G. Oakley, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company the corporation described in and which executed the annexed bond of Edwin F. Hale, as surety thereon who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the attorney in fact of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Edwin F. Hale is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that he is acquainted with Gilman Ashburner and knows him to be attorney in fact of said company; and that the signature of said Gilman Ashburner subscribed to said bond is the genuine handwriting of said Gilman Ashburner and was thereto subscribed by order and authority of said board of directors,

45 and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000).

ALONZO G. OAKLEY.



Sworn to, acknowledged before me and subscribed in my presence this 15th day of May, 1905.

JOHN A. SHIELDS,  
U. S. Commissioner.

Endorsed: U. S. circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Bail bond.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—The within bond approved as to form and sufficiency. May 15th, 1905. John A. Shields, U. S. commissioner.—U. S. circuit court, southern district of New York, Filed May 15, 1905, John A. Shields, clerk.

46 United States Circuit Court, Southern District of New York.

*In re* HALE.

WALLACE, Circuit Judge:

This is a proceeding in *habeas corpus* to test the legality of the imprisonment of the petitioner pursuant to an order of the circuit court adjudging him guilty of contempt in refusing to produce certain documents and writings, and answer certain questions, as a witness before the grand jury empaneled in that court. The petitioner was the secretary and treasurer, and also a director, of MacAndrews & Forbes Company, a New Jersey corporation, and had been served with a *subpoena duces tecum* issued out of that court commanding him to testify and give evidence before the grand jury upon the part of the United States of America "in a certain action now pending and undetermined" in that court between the United States of America and the American Tobacco Company and the MacAndrews & Forbes Company, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, all of which were described generically, and may for present purposes be described as including all the correspondence and documents of his corporation originating since the date of its organization to which nineteen other named corporations or persons were parties. He appeared before the grand jury pursuant to the subpoena, and was then asked several questions bearing upon the general inquiry whether there was any agreement, arrangement, or understanding between his corporation and the American Tobacco Company in relation to the trade in licorice affecting the business  
47 between several States of the United States. He declined to produce the papers, or to answer the questions, stating to the grand jury as a reason for so doing that he had been advised by counsel that he was under no legal obligation to produce the writing, and that the production of the papers or the answers to the questions would tend to criminate him. Thereupon he was informed by the United States attorney that the proceeding was one under the

act of Congress to protect trade and commerce against unlawful restraints and monopolies, and it was not proposed to prosecute him or subject him to any penalty or forfeiture on account of anything to which he should testify, or as to which he should produce documentary or other evidence, and that he the district attorney offered and assured to him immunity and exemption from any such testimony. The petitioner again declined to answer, for the reasons previously stated. Subsequently the grand jury made a presentment to the court charging the petitioner with contempt because of his refusal to produce the writings and give the testimony required, and setting forth fully the facts relating thereto. When this presentment was submitted to the court, the petitioner being present, the court made an order directing him to answer the questions as propounded by the grand jury, and to forthwith produce the papers. Upon his refusal to comply further proceedings were taken which resulted in an order by the court adjudging him in contempt and committing him to the custody of the marshal until he should comply with its previous order.

It is insisted by the petitioner that his imprisonment and restraint are without lawful authority for reasons which may be summarized as follows: (1) That the grand jury could only investigate specific charges against particular persons, and as there was not any proceeding of that nature before them, and no cause or action of any kind whatever pending in the court, they were not in the exercise of proper authority in prosecuting the investigation when petitioner was before them, and consequently he could not be lawfully required to testify or give evidence; (2) that the petitioner was within the protection of the fifth amendment of the Constitution in refusing to testify or produce incriminating evidence against himself; and (3) that the order of the court directing him to produce the papers contravened the fourth amendment of the Constitution, and in effect deprived him of his right to be secure against an unreasonable search and seizure of his papers, and was equivalent to a warrant not issued upon probable cause or particularly describing the things to be seized.

It is manifest from the facts recited in the presentment made by the grand jury that the investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offence had been committed by either of the two corporations named in the subpoena. It appears to have been one which they were pursuing with the assistance of the United States attorney directed to the discovery of some infraction by one or both of these corporations of the law of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraint and monopolies," known as the anti-trust law. Consequently the first contention for the petitioner presents the question whether it is within

the competency of a grand jury to institute and pursue such an investigation in the exercise of its inquisitorial power.

The authority and functions of a grand jury in the courts of the United States in investigating criminal offences are not prescribed by statute, but are such as inhere in  
49 that body by the general sanction of the common law courts.

That a grand jury is not confined to the investigation of an alleged offence to which their attention has been called by the court, or which has been laid before them in an indictment or an information by the prosecuting officer of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the States where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in *Frisbie vs. United States* (157 U. S., 160): "In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment." That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to a grand jury in the United States circuit court for the district of California (2 Sawy., 667). That a grand jury has certain inquisitorial powers, and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed, is also a proposition which has been frequently affirmed by the courts of this country; but as to the extent and limitation of this power there is a pronounced divergency of judicial opinion. It will suffice to refer to a few of the many citations which counsel have with great industry collated.

In *Blaney vs. State of Maryland* (74 Md., 153), the court said:

50 "However restricted the functions of grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully press, and upon their own motion originate charges against offenders, though no preliminary proceeding has been had before a magistrate, and though neither the court nor the State's attorney has laid the matter before them.  
\* \* \* Though far reaching and seemingly arbitrary, this power is at all times subordinate to the law, and experience has taught that it is one of the best means to preserve the good order of the Commonwealth, and to bring the guilty to punishment."

In *re Lester* (77 Ga., 143) the supreme court, after stating in its opinion that it was undeniable that the powers of the grand jury are to a certain extent inquisitorial but are to be exercised within well defined limits, said: "Anything they can find out upon inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to

disclose to them who have violated the public laws, and the names of persons by whom such infractions can be established ; in short, to make any man the spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer." Such an exercise of power, the court said, would be in derogation of " rights regarded as sacred and paramount in the intercourse between man and man ; and these rights have been carefully guarded not only by the spirit of our law, but by its express enactment."

In the United States circuit court for the district of Tennessee (reported in Wharton on Criminal Pleading, p. 224) Mr. Justice Catron compelled witnesses to answer who had been summoned by the grand jury, when it did not appear that there was any specific charge made against any particular person, and when the questions

51 were whether the witnesses knew of any person or persons in the city of Nashville who had begun, or set on foot, or provided means for, a military expedition to the island of Cuba. He said, "As all these questions tend fairly and directly to establish some of the offenses made indictable by the act of 1818, and are pertinent to the charge delivered to the grand jury they may be properly propounded, unless the answers would tend to establish that the witness was himself guilty."

In the United States *vs.* Kilpatrick (16 F. R., 765), the court after approving the practice of the State courts in North Carolina, said that grand juries "cannot make inquisitions into the general conduct of private business of their fellow-citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors." He adds : "The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition."

In Thompson & Merriam on Juries, section 615, it is said, referring to authorities cited : "These expressions of opinion bristle with evidence of the inquisitorial power of the grand jury to inquire of their own motion into offences of every character punishable by the court, of which it is a component part."

The subject is summed up in vol. 17 Am. & Eng. Enc. of Law (2nd ed.), p. 1279, as follows : "Although it has been sometimes asserted that at common law a grand jury was charged especially with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offences, according to the weight of authority the power of the grand jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body is ordinarily limited to cases in which individuals have been charged with specific

52 crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the court or the prosecuting attorney ; and it has no

power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender." The result of the authorities seems to be fairly summarized in the last citation.

The question whether an improper exercise of the inquisitorial power subverts the jurisdiction of the court, or is merely such an irregularity as to enable the accused or a witness to invoke the intervention of the court, or as may vitiate an indictment, has never been decided. Were it not for the implication arising from the treatment of the subject in *Counselman vs. Hitchcock* (142 U. S., 547), it would seem quite clear that it could not affect the jurisdiction of the court. The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court. The court can at any time direct the grand jury to consider a particular accusation or to investigate a supposed violation of the criminal law, and whether it does this by direct instructions, or by directing the prosecuting officer to present the matter for the consideration of the grand jury, is of no consequence. If in the absence of such instructions the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene and correct or suppress the proceedings. If the conduct of the grand jury is called to its attention, and the court approves or disapproves, whether its judgment may be correct or wrong, it is in the exercise of its undoubted jurisdiction; and though it is erroneous it is not void or illegal and cannot be reviewed by *habeas corpus*. Of course this is not true in cases where the court transcends its authority.

53 In the *Counselman* case, which was a *habeas corpus* case, the court adverted to the contention that the jury in the particular case had not been "investigating specific charges against particular persons," but said that it was not necessary to intimate any opinion as to the validity of the contention, and placed its decision upon another ground. The circumstance that the point was adverted to is hardly enough to suggest that the court considered it to be a valid one.

In the present case it does not appear that the investigation was initiated *sua sponte* by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his informal presentation of the charge to them. The *subpoena duces tecum* was the process of the court. As it commanded the witnesses to appear before the grand jury, it is manifest that the recital about the pending "action" could only have referred to a proceeding between the United States and the two corporations of the only kind which a grand jury can entertain, viz: a preliminary investigation to ascertain whether there was sufficient cause for an indictment. When, after the presentment of the alleged contumacy of the witness by the grand jury to the court, he was ordered by the court to answer questions and produce the doc-

uments, the action of the court was equivalent to an express instruction to the grand jury to investigate the proceeding mentioned in the presentment. While the investigation was not directed to a specific offence, it was directed to the inquiry whether one of the laws of the United States, the so-called anti-trust law, had been violated by either or both of the two corporations mentioned. Without this intervention by the court the investigation would have been

one upon the border line between the legitimate exercise and  
 54 the abuse of the inquisitorial power of the grand jury; but not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the court the original abuse of power, if there was any, became innocuous.

The contention for the petitioner that the order of the court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case would be clearly sound were it not for the effect of the immunity act of Congress of February 25, 1903. In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offences of the corporation, and was therefore criminally responsible himself. It is not for this court to question the soundness of the judgment in *Brown vs. Walker* (161 U. S., 591), or to weigh the value of the dissenting opinions. That judgment is authoritative that such an exemption from liability to prosecution or penalty as was secured to the witness by the immunity act of February 25, 1903, if it extends to testimony given or compelled before a grand jury, defeats the application of the fifth amendment to the Constitution so that the prohibition against compelling a person to be a witness against himself in a criminal case does not protect him. The petitioner's counsel do not argue otherwise, and their argument is that the immunity given by this act does not extend to testimony given by a witness before a grand jury. The provision is that no person shall be prosecuted or subjected to any penalty for or on account of any action, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, "in any proceeding, suit or prosecution" under the several statutes mentioned including the anti-trust act. The argument that a proceeding

before a grand jury is not such a proceeding as is meant  
 55 by the provision has been ingeniously presented, and is not without plausibility. But the word "proceeding" is a broad term, and was apparently intended to include some form of judicial inquiry other than a "suit or prosecution." In one sense it is true a criminal proceeding is not instituted against the accused person until a formal charge is made against him by indictment or information, or a complaint before a magistrate, and proceedings before a grand jury are not in that sense a criminal proceeding against the accused. *Post vs. United States* (161 U. S., 583). But in another sense any initial step before a judicial tribunal preliminary to the commencement of a civil suit or a criminal prosecution is a pro-



ceeding. As used in this statute, inasmuch as testimony given in a suit or prosecution embraces that given not only at the trial but upon all occasions incident to the controversy, the term "proceeding" if limited to some step in the progress of a civil suit or a criminal prosecution which has been previously instituted, is mere tautology. A rational construction seems to require it to include any preliminary step which is incident to the institution of a civil suit or a criminal prosecution.

The contention that the order requiring the petitioner to produce the papers called for by the *subpœna duces tecum* was made in violation of the petitioner's rights under the fifth amendment to the Constitution raises the question whether such a general inquisition into his private papers as is permitted by the terms of the *subpœna* was not such an abuse of judicial process as to amount to an unreasonable search and seizure. As Judge Cooley says in his work on Constitutional Limitations: "Near in importance to exemptions from an arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the Government, and protection in person, property and papers, against even the process of the law, except in a few specified cases."

In *Boyd vs. United States* (116 U. S., 616) it was decided that a law of Congress, which authorized a court of the United States in revenue cases on motion of the Government attorney to require a defendant to produce in court his private books, invoices, and papers, and permit the attorney under the direction of the court to make examination of the same, and which provided that if the defendant should refuse to produce the same the allegations of the attorney as to their contents specified in his written motion should be taken as confessed, was unconstitutional and void, as being repugnant to the fourth and fifth amendments to the Constitution. The court said: "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search or seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure." And the court concluded: "We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings." It will be observed that the statute in that case did not deprive the party of the custody of the books and papers which he was required to produce, and authorized only such an inspection of them as the court might direct. This judgment concludes an inquiry by this court as to the validity of two propositions, and it settles first, that a *subpœna* or an order of the court may be the equivalent of a

57 search and seizure within the constitutional provision; and, second, that any search or seizure for the purpose of obtaining incriminating evidence against the party is an unreasonable one within the meaning of the provision. That judgment would have controlled this case, and would have entitled the petitioner to be discharged, if the evidence sought to be procured could have been used to incriminate the petitioner. Is a search and seizure any the less unreasonable when it compels the official custodian of all the papers of his principal, whose duty it is to keep their privacy inviolable, to produce them in order to incriminate his principal? It may be conceded that his duty to the State and courts is paramount; but is this true when the evidence is not to be used against a principal who is under any criminal accusation, or against whom any civil suit is pending, and is only to be used to discover if possibly any ground of accusation can be found against him?

If the petitioner had been ordered to produce a single document, or numerous documents in his possession, which were adequately described to enable him to find them, for use as evidence in a pending action, civil or criminal, it seems plain that the order would have been unobjectionable, and such as the courts are daily making. Such was the case in *Interstate Commerce Commission vs. Baird* (194 U. S., 25), where the observation was made by the court upon which the Government relies.

The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offence by either of the two corporations; and it is apparent that the object was to enable the Government, by inspecting this mass of the private papers and documents of the petitioner's corporation, to find something which might induce the grand jury to find an indictment against his corporation. It is this which gives to  
58 the proceeding its color of oppression and the attributes of an unreasonable search and seizure.

The legality of search warrants has been sanctioned on the ground of public necessity, because without them felons and other malefactors would escape detection. But a search warrant for the papers of a suspected party, to be used as evidence against him, was illegal at the common law. *Archibold Cr. Law* (7th ed.) 141. Because of the obnoxious character of the process very great particularity is required in designating the articles to be searched for before the officers of the law are permitted to invade the premises where the articles sought are supposed to be. A designation of goods to be searched for as "goods, wares and merchandise," without more particular description, has been regarded as insufficient even in the case of goods supposed to be smuggled, where there is usually greater difficulty in giving description and consequently more latitude should be permitted, than in the case of property stolen. *Sandford vs. Nicholas* (13 Mass., 286). Lord Camden, speaking of a warrant not specifying the particular papers but authorizing the



seizure of all the papers of the person named in it, described it as "an execution upon all the party's papers," and said: "To enter a man's house by virtue of a nameless warrant, in order to produce evidence, is worse than the Spanish inquisition; a law under which no Englishman would care to live an hour." *Entineck vs. Carrington* (19 State Trials, 1029). Any process which is issued to perform the office of a search warrant should conform in some remote degree at least in certainty and specific description to the requirements of a valid search warrant. The subpoena issued in this case may possibly meet these requirements, but it is not too much to say that it resembles more nearly a general warrant to search all the private papers of a witness. It falls but little short of being in substance

59 and effect a roving commission, devised by the Government to compel a witness to bring before the grand jury a general mass of the private papers of his principal in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation. This was a wanton assault upon the right of privacy, and in my judgment the process, in view of the circumstances under which and the purpose for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the fourth amendment.

The conclusions thus indicated would ordinarily lead to an order for the petitioner's discharge; but the order compelling him to produce the papers alluded to in the subpoena was made by one of the judges of this court, and although it was not made under circumstances which afforded an opportunity for deliberate consideration, the manifest impropriety of reversing it indirectly in the same court, held by a different judge, is so great that it ought not to be done if the only result will be to shift the burden of preparing a record for a review by a higher tribunal from the one party to the other. Whether the present decision is in favor of the petitioner or against him, it is understood that it will be taken for review to the Supreme Court, and pending that review the petitioner will not be confined.

Under these circumstances an order will be entered refusing the discharge of the petitioner.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—*In re Hale*.—Opinion Wallace, C. J.—U. S. circuit court, southern district of New York, Filed Jun-8, 1905, John A. Shields, clerk.

60 At a stated term of the circuit court of the United States of America in and for the southern district of New York in the second circuit, held at the United States court and post office building in the borough of Manhattan, in the city of New York on the 10th day of June 1905.

Present: Hon. William J. Wallace, circuit judge.

In the Matter of the Application of EDWIN F. HALE for a Writ of  
*Habeas Corpus*.

On reading and filing the petition of the above named Edwin F. Hale, verified the 11th day of May, 1905, for a writ of *habeas corpus*, the writ of *habeas corpus* issued thereon on the 13th day of May 1905, directed to William Henkel, United States marshal for the southern district of New York, the return to the said writ made by the said marshal on the 24th day of May 1905, and the petitioner's exception to the sufficiency of the said return, and a motion for his discharge, dated the said 24th day of May, 1905, and the petitioner having been duly produced before the court in obedience to the said writ of *habeas corpus*, and the same having duly come on to be heard.

Now after hearing Elihu Root, Esq., and De Lancey Nicoll, Esq., of counsel for the petitioner, in support of the application for  
61 the petitioner's discharge, Henry W. Taft, Esq., ass't United States attorney for the southern district of New York, in opposition to the said application and in support of a motion to remand the petitioner to custody, and due deliberation having been had in the premises, it is,

Ordered that the said writ of *habeas corpus* be and the same is hereby dismissed and discharged, and that the petitioner be and he is hereby remanded to the custody of the marshal.

Enter.

WILLIAM J. WALLACE,  
United States Circuit Judge.

Approved as to form.

FELIX H. LEVY,  
Ass't U. S. Attorney.

(Endorsed :) Circuit court of the U. S., southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Order discharging writ.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, N. Y. city.—U. S. circuit court, southern district of New York, Filed Jun- 18, 1905, John A. Shields, clerk.

62

Supreme Court of the United States.

In the Matter of the Application of EDWIN F. HALE for Writ of  
*Habeas Corpus*.

EDWIN F. HALE, Appellant,

vs.

WILLIAM HENKEL, Marshal in and for the Southern District of  
New York, Appellee. }

Know all men by these presents that we, Edwin F. Hale, as principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America, in the full and just sum of one thousand dollars (\$1000) to be paid to the United States, to which payment well and truly, to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this thirteenth day of June, 1905.

Whereas, lately, to wit, on the 10th day of June, 1905, at a circuit court of the United States in and for the southern district of  
63 New York, in a proceeding therein pending an order was entered dismissing a certain writ of *habeas corpus* theretofore allowed upon the application of the above named petitioner and remanding the petitioner to the custody of the above named appellee; and

Whereas, the said petitioner has duly obtained an appeal from the said order to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the said circuit court to review the same, and

Whereas, the said court, good cause therefor being shown, has by order this day duly made and entered directed that the petitioner may be enlarged upon recognizance, with sufficient surety, in the sum of one thousand dollars (\$1000) for his appearance to answer the judgment of the said Supreme Court;

Now, the condition of this recognizance is such, that if the said petitioner Edwin F. Hale, shall appear to answer the judgment of the Supreme Court upon the said appeal, then this recognizance shall be void, else to remain in full force and effect.

EDWIN F. HALE.

[SEAL.]

THE UNITED STATES FIDELITY AND  
GUARANTY COMPANY,

By ALONZO G. OAKLEY, Attorney in Fact.

Attest:

[SEAL.]

GILMAN ASHBURNER, Attorney in Fact.

Taken and acknowledged before me this 13th day of June, 1905.

JOHN A. SHIELDS,  
U. S. Commissioner.

64      Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK,      {  
County of New York,      } ss.:

Before me personally came Alonzo G. Oakley, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company the corporation described in and which executed the annexed bond of Edwin F. Hale, as surety thereon who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the attorney in fact of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Edwin F. Hale is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that he is acquainted with Gilman Ashburner and knows him to be attorney in fact of said company; and that the signature of said Gilman Ashburner subscribed to said bond is the genuine handwriting of said Gilman Ashburner and was thereto

subscribed by order and authority of said board of directors,  
65      and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000).

ALONZO G. OAKLEY.

Sworn to, acknowledged before me and subscribed in my presence this 13th day of June, 1905.

JOHN A. SHIELDS,  
U. S. Commissioner.

(Endorsed :) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant, of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York. Filed Jun- 13, 1905. John A. Shields, clerk.

66 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of EDWIN F. HALE for a Writ of *Habeas Corpus*.

EDWIN F. HALE, Appellant,	}
<i>vs.</i>	
WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.	

SIRS: Please take notice that Edwin F. Hale, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 10th day of June, 1905, discharging the writ of *habeas corpus* herein, and from each and every part of the said order.

Dated at the city of New York the 13th day of June, 1905.

Yours &c.,                      NICOLL, ANABLE & LINDSAY,  
Attorneys for the Petitioner.

Office & post office address, 31 Nassau street, borough of Manhattan, New York city.

67 To Hon. Henry L. Burnett, United States attorney in and for the southern district of New York. William Henkel, United States marshal, southern district of New York. John A. Shields, Esq., clerk of the circuit court of the United States in and for the southern district of New York.

Endorsed: United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Notice of appeal.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York. U. S. circuit court, southern district of New York, Filed Jun-13, 1905, John A. Shields, clerk.

68 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of EDWIN F. HALE for a Writ of *Habeas Corpus*.

EDWIN F. HALE, Appellant,	}
<i>against</i>	
WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.	

Edwin F. Hale, the petitioner and appellant above named, feeling himself aggrieved by the final order heretofore made and entered

in this court in this cause on the — day of June, 1905, whereby it was decided and ordered (among other things) that the writ of *habeas corpus* issued herein on the 13th day of May, 1905, be discharged, now comes Nicoll, Anable & Lindsay, his solicitors and counsel, and petitions this court for an order allowing him to prosecute an appeal from the said final order to the Supreme Court of the United States under and according to laws of the United States in that behalf made. Your petitioner is advised by counsel that there are grave doubts concerning the legality, under the Constitution and laws of the United States, of his imprisonment and detention under the commitment of this court mentioned in his petition for the said writ and the validity and regularity of the proceedings referred to in the said petition and that he desires in good faith to submit these questions to the Supreme Court for their determination. And your petitioner will ever pray.

NICOLL, ANABLE & LINDSAY,  
Solicitors and Counsel for the Petitioner.

31 Nassau street, borough of Manhattan, New York city.

UNITED STATES OF AMERICA, }  
Southern District of New York, } ss :

Edwin F. Hale, being duly sworn says: That he is the petitioner above named and that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

EDWIN F. HALE.

Sworn to before me this 15th day of June, 1905.

JOHN A. SHIELDS,  
U. S. Commissioner.

70 The foregoing petition for appeal is granted and the claim of the appellant therein made is allowed. Supersedeas bond fixed at two hundred and fifty dollars (\$250). And good cause therefor being shown, pending the said appeal the petitioner may be enlarged upon recognizance, with sufficient surety in the sum of one thousand dollars (\$1000.) for his appearance to answer the judgment of the Supreme Court.

Done in open court this 13th day of June, 1905.

E. HENRY LACOMBE,  
United States Circuit Judge.

Endorsed: United States circuit court, southern district of New York.—In the Matter of the application of Edwin F. Hale for writ of *habeas corpus*.—Edwin F. Hale, appellant, v. William Henkel, marshal in and for the southern district of New York, appellee.—

Petition for appeal and allowance thereof.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau St., N. Y. city.—Due service of the within petition & allowance of appeal is hereby admitted this 13th day of June, 1906.—Felix V. Levy, ass't U. S. att'y. Wm. Henkel, U. S. marshal.—United States circuit court, southern district of New York. Filed Jun- 13, 1905, John A. Shields, clerk.

71 In the Supreme Court of the United States.

In the Matter of the Application of EDWIN F. HALE for Writ of *Habeas Corpus*.

EDWIN F. HALE, Appellant,

vs.

WILLIAM HENKEL, Marshal in and for the Southern District of  
New York, Appellee.

Now comes the petitioner, Edwin F. Hale, by Nicoll, Anable & Lindsay, his attorneys, in connection with his petition of appeal to the Supreme Court from the order of the circuit court of the United States in and for the southern district of New York, entered herein on the — day of June, 1905, discharging the writ of *habeas corpus* allowed herein on the 13th day of May, 1905, and makes and files the following assignment of errors:

The court erred:

1. In dismissing the said writ of *habeas corpus*.

2. In holding that the petitioner was lawfully held in custody under the commitment of the circuit court dated the 11th day of May, 1905, and referred to in the said petition.

72 3. In holding that the circuit court had jurisdiction under the Constitution and laws of the United States by reason of any of the matters or things contained and set forth in the presentments or reports of the grand jury referred to in said petition, or either of them, to entertain any charges or charges of contempt against the petitioner, or to act or proceed in any manner in the premises.

4. In holding that at the time the petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was any cause of action of any kind whatever depending in the circuit court between the United States and the corporations named in the *subpoena duces tecum*, a copy of which is annexed to the petition, in which the petitioner could lawfully be required under the said Constitution and laws to testify or give evidence before the grand jury.

5. In holding that the grand jury was in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in the said reports or presentments.

6. In holding that section 1 of the legislative executive and judi-



cial appropriation act approved February 25, 1903, gave the petitioner immunity from prosecution for or on account of transactions, matters or things concerning which he was directed to testify and produce evidence before the grand jury.

73 7. In holding that the investigation before the grand jury in which the petitioner was required to testify and produce papers and documents under the circumstances set forth in the petition was a proceeding, suit or prosecution under the so-called Sherman act, being "An act to protect trade and commerce against unlawful restraint and monopolies" (26 Stat. 209) and the acts amendatory thereof and supplemental thereto and particularly the said act of February 25, 1903.

8. In holding that the petitioner was not privileged under the Constitution and laws of the United States and particularly by the fifth amendment to the Constitution, to refuse to testify or produce evidence before the said jury upon the said investigation when by so doing he might incriminate himself.

9. In holding that the said act of February 25, 1903, does not usurp and infringe upon the pardoning power exclusively vested in the President of the United States by the express terms of section 2 of article II of the Constitution of the United States.

10. In holding that the said act of February 25, 1903, does not infringe upon and set at naught the express provisions of article X of the amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people.

74 11. In holding that the said act of February 25, 1903, does not deprive the various States of the United States of the sovereign right and power reserved to them by the said article X to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, provided such persons testify or produce evidence documentary or otherwise, concerning such transactions, matters and things in proceedings, suits or prosecutions under the three acts mentioned in the said act of February 25, 1903.

12. In holding that the said act of February 25, 1903, does not impair the right of the various States of the United States under article X, aforesaid, to prosecute and punish offenders against their own peace and dignity.

13. In holding that the said act of February 25, 1903, by undertaking in effect to grant pardons to persons who have been concerned in transactions, matters or things violative of the laws of the various States, provided such persons testify and produce evidence documentary or otherwise, concerning such transactions matters or things in proceedings, suits or prosecutions under the statute therein mentioned, does not usurp the power expressly reserved to the States by article X, aforesaid, to grant or withhold pardons and to provide for

and deal with the granting or withholding or granting therein in accordance with their own constitution and laws.

14. In holding that the said act of February 25, 1903, requires a person to testify or produce evidence in proceedings, suits or prosecutions under the three acts therein mentioned, notwithstanding such testimony or production may tend to criminate him.

75 15. In discharging the said writ notwithstanding the order of the circuit court of May 5, directing the petitioner forthwith to produce the papers called for by the *subpoena duces tecum* under the circumstances set forth in the said petition was made in violation of the petitioner's rights under the fourth amendment of the Constitution of the United States, providing that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be *be* violated.

16. In discharging the said writ notwithstanding the said order of May 5th was, in effect, a warrant to search for and seize the papers mentioned in the *subpoena duces tecum*, and was issued in violation of the said fourth amendment.

17. In discharging the said writ notwithstanding the issuance of the said *subpoena duces tecum*.

18. In holding, the papers mentioned in the said subpoena being the property of the McAndrews & Forbes Company and in the petitioner's custody solely, by reason of his official relations toward that company, that the compulsion of the said subpoena and of the order that he produces such papers thereunder would not, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation in violation of its rights under the said fourth amendment.

76 19. In holding that by refusing to comply with the requirements of the said subpoena and of the order of the circuit court that he produce the said papers thereunder, the petitioner was not protecting by lawful means the company's right under the said fourth amendment to be secure in its papers and effects against unreasonable searches and seizures.

20. In holding that the petitioner was under a legal obligation to enforce and obey the said order of May 5th.

21. In holding that it was not the petitioner's duty as an officer and director of the said corporation to disobey the said subpoena and order.

22. In holding that the order of the circuit court of May 8th, 1905, adjudging the petitioner guilty of contempt and the commitment issued pursuant to the said order were not without legal right, authority or jurisdiction of any kind and were not utterly void and ineffectual and that the petitioner's detention and imprisonment thereunder was not in violation of the Constitution of the United States, and in violation of his rights, privileges and immunities thereunder.

By reason whereof the petitioner prays that the said order discharging the writ of *habeas corpus* herein and remanding the peti-

- 77 tioner to the custody of the appellee be reversed and that he be dismissed and released from all further restraint in the premises.

EDWIN F. HALE, Petitioner.

NICOLL, ANABLE & LINDSAY,  
Counsel for Petitioner.

Read the 13th day of June, 1905.

E. HENRY LACOMBE,  
United States Circuit Judge.

Endorsed: United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for writ of *habeas corpus*.—Edwin F. Hale, appellant, vs. William Henkel, marshal in and for the southern district of New York.—Assignment of errors.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau St., New York.—U. S. circuit court, southern district of New York. Filed June 13, 1905. John A. Shields, clerk.

- 78 Supreme Court of the United States.

In the Matter of the Application of EDWIN F. HALE for Writ of  
*Habeas Corpus*.

EDWIN F. HALE, Appellant,  
vs.

WILLIAM HENKEL, Marshal in and for the Southern District of  
New York, Appellee. }

Know all men by these presents that we, Edwin F. Hale, as principal and the United States Fidelity & Casualty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars (\$250) to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of June, 1905.

- Whereas, lately, to wit, on the 10th day of June, 1905, at the circuit court of the United States in and for the southern district  
79 of New York, in a proceeding therein pending, an order as entered dismissing and discharging a certain writ of *habeas corpus* theretofore allowed upon the application of the above named petitioner and remanding him to the custody of the appellee; and

Whereas, the said petitioner has duly obtained an appeal from

the said order to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the said circuit court to review the same,

Now the condition of the above obligation is such, that if the said petitioner, Edwin F. Hale, shall prosecute said appeal to effect and shall answer all costs therefor, or failing to make the said appeal good, then the above obligation to be void, else to remain in full force and effect.

EDWIN F. HALE. [SEAL.]  
THE UNITED STATES FIDELITY AND  
GUARANTY CO.,  
By ALONZO G. OAKLEY, Attorney in Fact.

Attest:  
[SEAL.] GILMAN ASHBURNER,  
Attorney in Fact.

Taken and acknowledged before me this 13th day of June, 1905.

JOHN A. SHIELDS.  
U. S. Commissioner.

80 Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK, }  
County of New York, } ss:

Before me personally came Alonzo G. Oakley, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company the corporation described in and which executed the annexed bond of Edwin F. Hale, as surety thereon who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the attorney in fact of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Edwin F. Hale is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that he is acquainted with Gilman Ashburner and knows him to be — attorney in fact of said company; and that the signature of said Gilman Ashburner subscribed to said bond is the genuine handwriting of said Gilman Ashburner

81 and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000).

ALONZO G. OAKLEY.

Sworn to, acknowledged before me and subscribed in my presence this 13th day of June, 1905.

JOHN A. SHIELDS,  
U. S. Commissioner.

(Endorsed :) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant, of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Jun-13, 1905. John A. Shields, clerk.

82 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States, in the second circuit, to Honorable Henry L. Burnett, United States attorney for the southern district of New York, and to William Henkel, United States marshal in and for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the capital in the city of Washington in the District of Columbia on the 11th day of July, 1905, pursuant to a petition, allowance and notice of appeal filed in the clerk's office in the circuit court of the United States for the southern district of New York, wherein one Edwin F. Hale is the appellant and you, the said marshal are appellee, to show cause, if any there be, why the final order of the said circuit court in the said petition, allowance and notice of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above mentioned, this 13th day of June, 1905.

E. HENRY LACOMBE,  
United States Circuit Judge.

NICOLL, ANABLE & LINDSAY,  
Attorneys for Petitioner and Appellant.

83 Endorsed: United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for writ of *habeas corpus*.—Edwin F. Hale, appellant, vs. William Henkel, marshal in and for the southern district of New

York, appellee. Citation.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, N. Y. city. Due service of the within citation papers is hereby admitted this 13th day of June, 1905. Felix H. Levy, ass't U. S. att'y. Wm. Henkel, U. S. marshal.—U. S. circuit court, southern district of New York, Filed June 15, 1905, John A. Shields, clerk.

84 UNITED STATES OF AMERICA, }  
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty-three inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*. Edwin F. Hale, appellant vs. William Henkel, marshal in and for the southern district of New York, appellee as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of July in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and thirtieth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, Clerk.

[Endorsed:] United States Supreme Court. Edwin F. Hale appellant vs. William Henkel, marshal in and for the southern district of New York appellee. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,842. S. New York C. C. U. S. Term No. 340. Edwin F. Hale, appellant, vs. William Henkel, United States marshal in and for the southern district of New York. Filed July 13th, 1905. File No. 19,842.